CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 38 **MAY 5, 2004** **NO. 19**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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Bureau of Customs and Border Protection

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 3 2004)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

SUMMARY: The copyrights, trademarks, and trade names recorded with U.S. Customs and Border Protection during the month of March 2004. The last notice was published in the CUSTOMS BULLETIN on April 7, 2004.

Corrections or updates may be sent to Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, IPR Branch, 1300 Pennsylvania Avenue, N.W., Mint Annex, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: George Frederick McCray, Esq., Chief, Intellectual Property Rights Branch, (202) 572–8710.

Dated: April 14, 2004.

Paul Pizzeck for GEORGE FREDERICK MCCRAY, ESQ.,
Chief,
Intellectual Property Rights Branch.

04/02/2004 U.S. CUSTOMS SERVICE PAGE 1
07:54:05 IPR RECORDATIONS ADDED IN MARCH 2004 DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP0400041	20040303	20240303	U.A.F. WHITE SWAN LOGO	U.A. TRADING, INC.	N
COP0400042	20040322	20240322	BVLGARI CATALOG SPRING/SUMMER 2003 SILK COLLECTION	BULGARI S.P.A.	N
COP0400043	20040322	20240322	BVLGARI CATALOG SUNGLASS COLLECTION	BULGARI S.P.A.	N
COP0400044	20040322	20240322	BVLGARI CATALOG JEWELLERY 2003/2004 RETAILERS	BULGARI S.P.A.	N
COP0400045	20040326	20240326	INSTRUCTION MANUAL FOR VECTRON ULTRALITE	EDU-SCIENCE (H.K.) LTD.	N
COP0400046	20040326	20240326	VECTRON ULTRALITE FLYING SAUCER	EDU-SCIENCE (H.K.) LTD.	N
SUBTOTAL RECORDATION TYPE		6			
TMK0400176	20040301	20080908	DESIGN (TWO POLO PLAYERS ON HORSEBACK WITH MALLETS)	UNITED STATES POLO ASSOCIATION	N
TMK0400177	20040301	20080526	UNITED STATES POLO ASSOCIATION & DESIGN	UNITED STATES POLO ASSOCIATION	N
TMK0400178	20040301	20100125	UNITED STATES POLO ASSOCIATION FOUNDED 1890 & DESIGN	UNITED STATES POLO ASSOCIATION	N
TMK0400179	20040301	20080526	USPA	UNITED STATES POLO ASSOCIATION	N
TMK0400180	20040301	20090831	U.S. POLO ASSOCIATION FOUNDED 1890	UNITED STATES POLO ASSOCIATION	N
TMK0400181	20040301	20090817	U.S. POLO ASSOCIATION FOUNDED 1890	UNITED STATES POLO ASSOCIATION	N
TMK0400182	20040301	20121001	U.S. POLO & DESIGN	UNITED STATES POLO ASSOCIATION	N
TMK0400183	20040301	20111208	UNITED STATES POLO ASSOCIATION & DESIGN	UNITED STATES POLO ASSOCIATION	N
TMK0400184	20040301	20080927	UNITED STATES POLO ASSOCIATION & DESIGN	UNITED STATES POLO ASSOCIATION	N
TMK0400185	20040303	20100116	VICTORIA	BARCLAY PRODUCTS LIMITED	N
TMK0400186	20040303	20120112	GREENLIFE	V.E. IRONS, INC.	N
TMK0400187	20040303	20121119	V.E. VIT-RA-TOX IRONS INC.	V.E. IRONS, INC.	N
TMK0400188	20040303	20120728	ZOLOFT	PFIZER INC.	N
TMK0400189	20040303	20131007	PALM LASER	PLS-PACIFIC LASER SYSTEMS	N
TMK0400190	20040303	20091005	PANTHER	PRESTIGE AUTOTECH CORPORATION	N
TMK0400191	20040303	20070923	PCW AND DESIGN	PRESTIGE AUTOTECH CORPORATION	N
TMK0400192	20040303	20110626	PANTHER (STYLIZED)	PRESTIGE AUTOTECH CORPORATION	N
TMK0400193	20040303	20110626	DESIGN	PRESTIGE AUTOTECH CORPORATION	N
TMK0400194	20040303	20110717	PANTHER AND DESIGN	PRESTIGE AUTOTECH CORPORATION	N
TMK0400195	20040303	20110731	AKUZA	PRESTIGE AUTOTECH CORPORATION	N
TMK0400196	20040303	20111218	AKUZA ROAD CONCEPTS	PRESTIGE AUTOTECH CORPORATION	N
TMK0400197	20040303	20110918	AFANBRAND	S.D.J. TRADING INC.	N
TMK0400198	20040303	20121117	PEPSODENT	CHURCH & DWIGHT COMPANY	N
TMK0400199	20040303	20061105	MENTADENT	CHURCH & DWIGHT COMPANY	N
TMK0400200	20040303	20130909	MENTADENT	CHURCH & DWIGHT COMPANY	N
TMK0400201	20040303	20130116	AIM	CHURCH & DWIGHT COMPANY	N
TMK0400202	20040303	20131007	DB (PLUS DESIGN)	DOONEY & BOURKE INC.	N
TMK0400203	20040303	20131209	RIMMER	NANTUCKET HARVEST CO., INC.	N
TMK0400204	20040303	20140208	GOOD TIME JAZZ	FANTASY INC.	N
TMK0400205	20040303	20140108	DIORELLA	PARFUMS CHRISTIAN DIOR S.A.	N
TMK0400206	20040304	20130617	STRATTERA	ELI LILLY AND COMPANY	N
TMK0400207	20040304	20130902	LEXSCAPE	HEALTH LANGUAGE, INC.	N
TMK0400208	20040309	20060304	JONEL	MARKWINS INTERNATIONAL CORP.	N
TMK0400209	20040309	20130729	AJ ARMANI JEANS AND DESIGN	GA MODEFINE SA	N
TMK0400210	20040309	20090619	JONEL	MARKWINS INTERNATIONAL CORP.	N
TMK0400211	20040309	20040507	JONEL	MARKWINS INTERNATIONAL CORP.	N
TMK0400212	20040311	20131130	MARLINS	FLORIDA MARLINS, L.P.	N
TMK0400213	20040311	20131207	CR (STYLIZED)	COLORADO ROCKIES BASEBALL CLUB	N
TMK0400214	20040311	20131206	INDIANS MISCELLANEOUS DESIGN	CLEVELAND INDIANS BASEBALL CO.	N
TMK0400215	20040311	20131123	BOSTON CELTICS AND DESIGN	BANNER SEVENTEEN, LLC.	N

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK0400216	20040311	20131130	PACERS AND DESIGN	PACERS BASKETBALL CORP.	N
TMK0400217	20040311	20110925	EXCURSION AND DESIGN	HOLLYWOOD SOUND INTERNATIONAL	N
TMK0400218	20040311	20041227	1/4	PHILADELPHIA CERVICAL COLLAR CO.	N
TMK0400219	20040311	20060123	PHILLY	PHILADELPHIA CERVICAL COLLAR CO.	N
TMK0400220	20040311	20130429	PATRIOT	PHILADELPHIA CERVICAL COLLAR CO.	N
TMK0400221	20040311	20101114	A-SERIES	PHILADELPHIA CERVICAL COLLAR CO.	N
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TMK0400223	20040311	20120917	EMT'S CHOICE	PHILADELPHIA CERVICAL COLLAR CO.	N
TMK0400224	20040311	20101114	BLOC-HEAD	PHILADELPHIA CERVICAL COLLAR CO.	N
TMK0400225	20040311	20131202	PRO-FIT	PHILADELPHIA CERVICAL COLLAR CO.	N
TMK0400226	20040311	20080519	NETHEAD	DOROTHEA A. LORBER	N
TMK0400227	20040311	20130812	ILLES SEASONINGS & FLAVORS AND DESIGN	THE ILLES COMPANY	N
TMK0400228	20040311	20111120	BOTOX	ALLERGAN, INC.	N
TMK0400229	20040311	20120205	BOTOX BOTULINUM TOXIN TYPE A PURIFIED NEUROTOXIN	ALLERGAN, INC.	N
TMK0400230	20040311	20120421	SYMANTEC	SYMANTEC CORPORATION	N
TMK0400231	20040311	20121127	HAMILTON	THE SWATCH GROUP (U.S.) INC.	N
TMK0400232	20040311	20130728	OMEGA AND DESIGN (GREEK INSCRIPTION)	OMEGA SA	N
TMK0400233	20040319	20131221	ETIENNE AIGNER & HORSESHOE DESIGN	ETIENNE AIGNER, INC.	N
TMK0400234	20040319	20130624	DETAILS	FAIRCHILD PUBLICATIONS INC.	N
TMK0400235	20040319	20130819	DALLAS MAVERICKS WITH HORSE DESIGN	DALLAS BASKETBALL LIMITED	N
TMK0400236	20040319	20121224	VANCOUVER GRIZZLIES AND DESIGN	HOOPS L.P.	N
TMK0400237	20040322	20090713	FLEET ENEMA PACKAGE DESIGN	C.B. FLEET INVESTMENT CORP.	N
TMK0400238	20040322	20040717	PHOSPHO-SODA	C.B. FLEET INVESTMENT CORP.	N
TMK0400239	20040323	20081128	GG (STYLIZED LETTERING)	GUCCI AMERICA, INC.	N
TMK0400240	20040323	20090323	G (STYLIZED)	GUCCI AMERICA, INC.	N
TMK0400241	20040323	20081128	GG (STYLIZED)	GUCCI AMERICA, INC.	N
TMK0400242	20040323	20081128	GG (STYLIZED)	GUCCI AMERICA, INC.	N
TMK0400243	20040323	20090724	DESIGN	GUCCI AMERICA, INC.	N
TMK0400244	20040323	20090731	DESIGN	GUCCI AMERICA, INC.	N
TMK0400245	20040323	20110623	GG (INTERLOCKING)	GUCCI AMERICA, INC.	N
TMK0400246	20040323	20110908	GUCCI	GUCCI AMERICA, INC.	N
TMK0400247	20040323	20110915	GUCCI	GUCCI AMERICA, INC.	N
TMK0400248	20040323	20110915	GUCCI	GUCCI AMERICA, INC.	N
TMK0400249	20040323	20120713	GUCCI	GUCCI AMERICA, INC.	N
TMK0400250	20040323	20120727	GUCCI	GUCCI AMERICA, INC.	N
TMK0400251	20040323	20130128	GG & DESIGN	GUCCI AMERICA, INC.	N
TMK0400252	20040325	20130608	CERTINA	CERTINA, KURTH FRERES S.A.	N
TMK0400253	20040325	20131118	LIBRA	HOUSE OF MOHAN CORPORATION	N
TMK0400254	20040325	20131118	LEO	HOUSE OF MOHAN CORPORATION	N
TMK0400255	20040325	20131118	ARIES	HOUSE OF MOHAN CORPORATIO	N
TMK0400256	20040325	20131118	CANCER	HOUSE OF MOHAN CORPORATION	N
TMK0400257	20040325	20131118	GEMINI	HOUSE OF MOHAN CORPORATION	N
TMK0400258	20040325	20131118	VIRGO	HOUSE OF MOHAN CORPORATION	N
TMK0400259	20040325	20131118	SCORPIO	HOUSE OF MOHAN CORPORATION	N
TMK0400260	20040325	20131118	SAGITTARIUS	HOUSE OF MOHAN CORPORATION	N
TMK0400261	20040325	20131118	CAPRICORN	HOUSE OF MOHAN CORPORATION	N
TMK0400262	20040325	20070415	DOVE	CHESEBROUGH PONDS, INC.	N
TMK0400263	20040330	20140106	MERKEL	GSI INCORPORATED	N
TMK0400264	20040330	20130422	KODAK	EASTMAN KODAK COMPANY	N

AGENCY INFORMATION COLLECTION ACTIVITIES: AFRICAN GROWTH AND OPPORTUNITY ACT (AGOA) TEXTILE CERTIFICATE OF ORIGIN

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Proposed collection; comments requested.

SUMMARY: The Bureau of Customs and Border Protection (CBP) of the Department of Homeland Security has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995: African Growth and Opportunity Act Certificate of Origin. This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with no change to the burden hours. This document is published to obtain comments form the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (68 FR 70284) on December 17, 2003, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before May 21, 2004.

ADDRESSES: Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, Washington, D.C. 20503. Additionally comments may be submitted to OMB via facsimile to (202) 395–6974.

SUPPLEMENTARY INFORMATION:

The Bureau of Customs and Border Protection (CBP) encourages the general public and affected Federal agencies to submit written comments and suggestions on proposed and/or continuing information collection requests pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). Your comments should address one of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the Proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies/components estimate of the burden of The proposed collection of information, in-

cluding the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collections of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Title: African Growth and Opportunity Act Certificate of Origin
OMB Number: 1651–0082
Form Number: None
Abstract: The collection of information is required to implement the duty preference provisions of the African Growth and Opportunity Act (AGOA) to provide extension of duty-free treatment under the Generalized System of Preferences (GSP) to sensitive articles normally excluded from GSP duty treatment. It also provides for the entry of specific textile and apparel articles free of duty and free of any quantitative limits to the countries of sub-Saharan Africa.
Current Actions: This submission is being submitted to extend the expiration date with no change to the burden hours.
Type of Review: Extension (without change)
Affected Public: Businesses, Institutions
Estimated Number of Respondents: 440
Estimated Time Per Respondent: 23 hours
Estimated Total Annual Burden Hours: 10,400
Estimated Total Annualized Cost on the Public: $239,269
If additional information is required contact: Tracey Denning, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.2.C, Washington, D.C. 20229, at 202–927–1429.

Dated: April 14, 2004

TRACEY DENNING,
Agency Clearance Officer,
Information Services Branch.

[Published in the Federal Register, April 21, 2004 (69 FR 21566)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, April 21, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF CERTAIN METAL COUPLINGS AND CONNECTORS

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of two tariff classification ruling letters and revocation of treatment relating to the classification of certain metal couplings and connectors.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (Customs) is revoking two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain metal couplings and connectors. Similarly, Customs is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed revocation was published on March 10, 2004, in Volume 38, Number 11 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after July 4, 2004.

FOR FURTHER INFORMATION CONTACT: David Salkeld, General Classification Branch, at (202) 572–8781.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published in the March 10, 2004, CUSTOMS BULLETIN, Volume 38, Number 11, proposing to revoke New York Ruling Letter (NY) I81109, dated April 26, 2002, and NY A82216, dated April 17, 1996, and to revoke any treatment previously accorded by Customs to substantially identical merchandise. No comments were received in response to this notice.

In NY I81109 and NY A82216, Customs classified certain metal couplings and connectors. In NY I81109, Customs classified steel couplings and connectors under subheading 7326.90.85, HTSUS, which provides for "Other articles of iron and steel: Other: Other: Other: Other." In NY A82216, Customs classified zinc couplings and connectors under subheading 7307.00.60, HTSUS, which provides for "Other articles of zinc: Other." It is now Customs' position, that the threaded steel couplings subject to this notice are classified in subheading 7307.92.30, which provides for "Tube or pipe fittings (for example, couplings, elbows, sleeves) of iron or steel: Other: Threaded elbows, bends and sleeves: Sleeves (couplings);" the other steel connectors subject to this notice are classified in subheading 7307.99.50, which provides for "Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: Other: Other: Other;" and the zinc couplings and connectors subject to this notice are classified in subheading 7906.00.00, HTSUS, which provides for "Zinc tubes, pipes and tube or pipe fittings (for example, couplings, elbows, sleeves)."

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved with substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY I81109 and NY A82216 and any other ruling not specifically identified that is contrary to the determination set forth in this notice to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQs) 966958 and 966965 (Attachments A and B respectively). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the determination set forth in this notice.

In accordance with 19 USC 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: April 20, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966958
April 20, 2004
CLA–2 RR:CR:GC 966958 DSS
CATEGORY: Classification
TARIFF NO.: 7307.92.3010, 7307.99.5045

MR. JIM WICKSTEAD
CIRCLE INTERNATIONAL, INC.
991 Supreme Drive
Bensenville, IL 60106

RE: Revocation of NY I81109; Zinc-plated steel compression fittings from India

DEAR MR. WICKSTEAD:

This letter is pursuant to the Bureau of Customs and Border Protection's (Customs) reconsideration of New York Ruling Letter (NY) I81109, dated April 26, 2002. We have reviewed the classification in NY I81109 and have determined that it is incorrect. This ruling sets forth the correct classification.

Pursuant to section 625 (c), Tariff Act of 1930 (19 USC 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY I81109 was published in the March 10, 2004, CUSTOMS BULLETIN, Volume 38, Number 11. No comments were received in response to this notice.

FACTS:

In NY I81009, we classified certain zinc-plated steel compression fittings from India. The articles were described in NY I81109 as follows:

> The samples you provided are connectors for junction boxes. Your request includes metallic setscrew connectors, metallic setscrew couplings, metallic compression connectors, and metallic compression fittings. The items are manufactured from mild steel and are zinc-plated. They are used to connect conduits together.

In NY I81109, we classified the instant articles under subheading 7326.90.8586, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Other articles of iron or steel: Other: Other: Other: Other: Other."

ISSUE:

Whether the instant articles are classified as steel pipe fittings under heading 7307, HTSUSA, or as other articles of iron and steel under heading 7326, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the

goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUSA and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

7307	Tube or pipe fittings (for example, couplings, elbows, sleeves) of iron or steel:
	Other:
7307.92	Threaded elbows, bends and sleeves:
7307.92.30	Sleeves (couplings)
7307.92.3010	Of iron or nonalloy steel
	* *
7307.99	Other:
7307.99.50	Other
	Of iron or nonalloy steel
7307.99.5045	Other
	* * *
7326	Other articles of iron or steel:
7326.90	Other:
	Other:
	Other:
7326.90.85	Other:
7326.90.8586	Other

EN 73.07 provides in pertinent part as follows:

> This heading covers fittings of iron or steel, mainly used for connecting the bores of two tubes together, or for connecting a tube to some other apparatus, or for closing the tube aperture. This heading **does not** however **cover** articles used for installing pipes and tubes but which do not form an integral part of the bore (e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, connecting pieces, etc.) (heading **73.25** or **73.26**)[emphasis in original].

The connection is obtained:

—by screwing, when using cast iron or steel threaded fittings;

—or by welding, when using butt-welding or socket-welding steel fittings. In the case of butt-welding, the ends of the fittings and of the tubes are square cut or chamfered;

—or by contact, when using removable steel fittings.

This heading therefore includes flat flanges and flanges with forged collars, elbows and bends and return bends, reducers, tees, crosses, caps and plugs, lap joint stub-ends, fittings for tubular railings and structural elements, off sets, multi-branch pieces, couplings or sleeves, clean out traps, nipples, unions, clamps and collars.

In NY I81109, we concluded that the instant articles were articles of steel not provided for elsewhere in the HTSUS. Because heading 7326, HTSUS, covers all articles of iron or steel not elsewhere specified or included (see EN 73.26), the goods will be provided for in heading 7326, HTSUS, only if they are described in that heading and if they are not provided for in another heading (in this instance, heading 7307).

New information has been presented to Customs, however, that has caused us to view the classification in NY I81109 as incorrect. This information indicates that the connectors and couplings serve to connect the bores of two tubes together or to connect a tube to some other apparatus (*i.e.*, a junction box). Therefore, we find that the instant articles are within the scope of the description provided in the heading text of 7307 and EN 73.07, above. Accordingly, we find that the instant articles are provided for in heading 7307, HTSUS. Some of the fittings are threaded, which indicates that the connection is made by screwing. These connectors and couplings are classified under subheading 7307.92.3010, HTSUS, which provides for, "Tube or pipe fittings (for example, couplings, elbows, sleeves) of iron or steel: Other: Threaded elbows, bends and sleeves: Sleeves (couplings): Of iron or nonalloy steel." The other fittings of nonalloy steel where the connection is not threaded (e.g., compression connectors), are classified in subheading 7307.99.5045, HTSUS, which provides for, "Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: Other: Other: Other: Of iron or nonalloy steel: Other."

HOLDING:

In accordance with the above discussion, at GRI 1 the instant fittings fall under heading 7307, HTSUS.

The threaded couplings are classified under subheading 7307.92.3010, HTSUS, which provides for, "Tube or pipe fittings (for example, couplings, elbows, sleeves) of iron or steel: Other: Threaded elbows, bends and sleeves: Sleeves (couplings): Of iron or nonalloy steel." The General Column One rate of duty is 1.2 percent.

The other fittings are classified in subheading 7307.99.5045, HTSUS, which provides for, "Tube or pipe fittings (for example, couplings, elbows, sleeves), of iron or steel: Other: Other: Other: Of iron or nonalloy steel: Other." The General Column One rate of duty is 4.3 percent.

In accordance with 19 USC 1625 (c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

EFFECT ON OTHER RULINGS:
NY I81109 is REVOKED.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966965
April 20, 2004
CLA–2 RR:CR:GC 966965 DSS
CATEGORY: Classification
TARIFF NO.: 7906.00.0000

MS. GAIL LEVY
SAMUEL SHAPIRO & COMPANY, INC.
World Trade Center, Suite 1200
401 East Pratt Street
Baltimore, MD 21202–3104

RE: Revocation of NY A82216; Zinc couplings and connectors from Russia

DEAR MS. LEVY:

This letter is pursuant to the Bureau of Customs and Border Protection's (Customs) reconsideration of New York Ruling Letter (NY) A82216, dated April 17, 1996. We have reviewed the classification in NY A82216 and have determined that it is incorrect. This ruling sets forth the correct classification.

Pursuant to section 625 (c), Tariff Act of 1930 (19 USC 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY A82216 was published in the March 10, 2004, CUSTOMS BULLETIN, Volume 38, Number 11. No comments were received in response to this notice.

FACTS:

In NY A82216, we classified certain zinc couplings and connectors from Russia. The articles were described in NY A82216 as follows:

1) 1/2″ compression coupling
2) 1/2″ screw coupling
3) 1/2″ compression connector
4) 3/4″ screw connector

These items are used in the electrical field and have many universal applications. All are made of Zamac #3, which is a zinc die cast.

In NY A82216, we classified the instant articles under subheading 7907.00.6000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Other articles of zinc: Other."

ISSUE:

Whether the instant articles are classified as zinc pipe fittings under heading 7906, HTSUSA, or as other articles of zinc under heading 7907, HTSUSA.

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, the ENs provide a commentary on the scope of each heading of the HTSUSA and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUSA provisions under consideration are as follows:

7906.00.00	Zinc tubes, pipes and tube or pipe fittings (for example, couplings, elbows, sleeves)
	* * *
7907.00	Other articles of zinc:
7907.00.60	Other

EN 73.07 (which applies to EN 79.06 by appropriate substitution of terms) provides in pertinent part as follows:

> This heading covers fittings of iron or steel, mainly used for connecting the bores of two tubes together, or for connecting a tube to some other apparatus, or for closing the tube aperture. This heading **does not** however **cover** articles used for installing pipes and tubes but which do not form an integral part of the bore (e.g., hangers, stays and similar supports which merely fix or support the tubes and pipes on walls, clamping or tightening bands or collars (hose clips) used for clamping flexible tubing or hose to rigid piping, taps, connecting pieces, etc.) (heading **73.25** or **73.26**)[emphasis in original].
>
> The connection is obtained:
>
> —by screwing, when using cast iron or steel threaded fittings;
>
> —or by welding, when using butt-welding or socket-welding steel fittings. In the case of butt-welding, the ends of the fittings and of the tubes are square cut or chamfered;
>
> —or by contact, when using removable steel fittings.

> This heading therefore includes flat flanges and flanges with forged collars, elbows and bends and return bends, reducers, tees, crosses, caps and plugs, lap joint stub-ends, fittings for tubular railings and structural elements, off sets, multi-branch pieces, couplings or sleeves, clean out traps, nipples, unions, clamps and collars.

In NY A82216, we concluded that the instant articles were articles of zinc not provided for elsewhere in the HTSUSA. Because heading 7907, HTSUS, covers all articles of zinc not elsewhere specified or included (see EN 79.07), the goods will be provided for in heading 7907, HTSUSA, only if they are described in that heading and if they are not provided for in another heading (in this instance, heading 7906).

New information has been presented to Customs, however, that has caused us to view the classification in NY A82216 as incorrect. This information indicates that the instant fittings serve to connect the bores of two tubes together or to connect a tube to some other apparatus (*i.e.*, a junction box). Therefore, we find that the instant articles are within the scope of the heading text of 7906 and the description provided in EN 73.07, above (and by extension EN 79.06). Accordingly, we find that the instant articles are provided for in heading 7906, HTSUSA. We find that they are classified under subheading 7906.00.00, HTSUSA, as: "Zinc tubes, pipes and tube or pipe fittings (for example, couplings, elbows, sleeves)."

HOLDING:

In accordance with the above discussion, at GRI 1, the correct classification for the instant fittings is under subheading 7906.00.0000, HTSUSA, which provides for "Zinc tubes, pipes and tube or pipe fittings (for example, couplings, elbows, sleeves)." The General Column One rate of duty is 3 percent.

In accordance with 19 USC 1625 (c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

EFFECT ON OTHER RULINGS:

NY A82216 is REVOKED.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR Part 177

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PLASTIC IDENTIFICATION BADGES

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of a ruling letter and treatment relating to the tariff classification of plastic identification badges under the Harmonized Tariff Schedule of the United States ("HTSUS").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling concerning the tariff classification of plastic identification badges and to revoke any treatment Customs has previously accorded to substantially identical transactions. Comments are invited on the correctness of the intended action. Notice of the proposed revocations was published on March 10, 2004, in Vol. 38, No. 11 of the *Customs Bulletin*. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after July 4, 2004.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, General Classification Branch: (202) 572–8776.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, notice proposing to revoke New York Ruling Letter ("NY") F81413, dated January 5, 2000, as it pertains to the classification of plastic identification badges, was published on March 10, 2004, in Vol. 38, No. 11 of the *Customs Bulletin*. No comments were received in response to this notice.

As stated in the proposed notice, the revocation action will cover any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings other than those herein identified; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to the effective date of this final decision.

The plastic identification badges at issue were classified by NY F81413 under heading 7117, HTSUS, which provides for imitation jewelry. We have determined that the intended purpose of these articles is to temporarily display the name of, rather than adorn, the person who wears them. Therefore, we believe the articles should be classified under heading 3926, HTSUS, which provides for other articles of plastic.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY F81413, and any other ruling not specifically identified, to reflect the proper classification of the plastic identification badges, pursuant to the analysis in Headquarters Ruling Letter ("HQ") 966569, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

Dated: April 20, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 966569
April 20, 2004
CLA–2 RR:CR:GC 966569 AML
CATEGORY: Classification
TARIFF NO.: 3926.90.98

MS. LISA THATCHER
AVERY DENNISON
OFFICE PRODUCTS NORTH AMERICA
50 Pointe Drive
Brea, CA 92821

RE: NY F81413 revoked; Plastic identification badges

DEAR MS. THATCHER:

This is in reference to your letter, dated May 19, 2003, to the National Commodity Specialist Division, New York, requesting reconsideration of New York Ruling Letter ("NY") F81413, dated January 5, 2000, regarding the classification of several styles of plastic identification badges, under the Harmonized Tariff Schedule of the United States ("HTSUS"). Your letter and samples of the articles were forwarded to this office for reply. We have reconsidered the classification determination made in NY F81413 and determined that it is incorrect. This letter sets forth the correct classification of the plastic identification badges.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of NY F81413 was published on March 10, 2004, in Vol. 38, No. 11 of the *Customs Bulletin.* No comments were received in response to this notice.

FACTS:

The articles under consideration are plastic identification badges. They were described in NY F81413 as follows:

1. Part #77711 74520 is a badge made of a neck hanging plastic badge holder with heavyweight cardstock insert, 4″ x 3″ in size, valued over 20 cents per dozen pieces.

2. Part #77711 74536 is a badge made of a plastic badge holder with a metal clip with heavyweight cardstock insert, 4″ x 3″ in size, valued over 20 cents per dozen pieces.

3. Part #77711 74540 is a badge made of a plastic badge holder with a metal pin with heavyweight cardstock insert, 4″ x 3″ in size, valued over 20 cents per dozen pieces.

After determining that "the essential character of the above-described badges is the plastic holder," NY F81413 held that the articles were classified under subheading 7117.90.75, HTSUS, which provides for imitation jewelry: other: other: valued over 20 cents per dozen pieces or parts: other: of plastics.

ISSUE:

Whether the subject merchandise is classifiable under heading 3926, HTSUS, which provides for other articles of plastics; or under heading 7117, HTSUS, which provides for imitation jewelry?

LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States ("HTSUS") in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 states, in part, that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to the remaining GRIs, applied sequentially. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.90	Other:
3926.90.98	Other.
	* * *
7117	Imitation jewelry:
7117.90	Other:
	Other:
	Valued not over 20 cents per dozen pieces or parts:
	Other:
7117.90.75	Of plastics.

Subheading 3926.90.98, HTSUS, is a so-called "basket" provision within Chapter 39, in which classification "is appropriate only when there is no tariff category that covers the merchandise more specifically." (*Apex Universal, Inc., v. United States*, 22 C.I.T. 465 (1998).) Further, the ENs to Chapter 39 exclude "imitation jewellery of heading 7117" from classification therein. Therefore, we are first addressing the competing provision within Chapter 71 that was determined to be appropriate for classification in NY F81413. Only if classification in heading 7117, HTSUS, is precluded will we address classification under heading 3926, HTSUS.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not

dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the *Federal Register* August 23, 1989 (54 FR 35127, 35128).

Note 11 to Chapter 71 provides, in pertinent part, that "for the purposes of heading 7117, the expression "imitation jewellery" means articles of jewellery within the meaning of paragraph (a) of Note 9 above." Note 9(a) provides in pertinent part that:

> the expression "articles of jewellery" means:
>
> (a) Any small objects of personal adornment (gem-set or not) (for example, rings, bracelets, necklaces, brooches, earrings, watchchains, fobs, pendants, tiepins, cufflinks, dressstuds, religious or other medals and insignia) . . .

The ENs to heading 7117 provide, in pertinent part, that:

> For the purposes of this heading, the expression **imitation jewellery**, as defined in Note 11 to this Chapter, is restricted to small objects of personal adornment, such as those listed in paragraph (A) of the Explanatory Note to heading 7113, *e.g.*, rings, bracelets (other than wristwatch bracelets), necklaces, earrings, cufflinks, etc., **but not including** buttons and other articles of **heading 96.06**, or dress combs, hairslides or the like, and hairpins of **heading 96.15** (bold emphasis in original) . . .

No argument has been presented nor do we believe that the articles at issue are designed or intended to be articles of personal adornment. Rather, the articles are designed and used functionally—they are used and reused (by simply replacing the paper inserts) to display the name of the wearer at a convention, meeting or other function. That is, the paramount function of the articles is to temporarily display the name of the wearer on an article of clothing.

We conclude, based upon consideration of the provisions of heading 7117, HTSUS, the Chapter Notes and the ENs thereto, that the articles are not classified under heading 7117, HTSUS.

An article is to be classified according to its condition as imported. See, *XTC Products, Inc. v. United States*, 771 F.Supp. 401, 405 (1991). See also, *United States v. Citroen*, 223 U.S. 407 (1911). In their condition as imported, the plastic identification badges are articles of molded plastic. In accordance with GRI 1, the articles are classified under heading 3926, HTSUS, which provides for other articles of plastics.

This conclusion comports in part with a prior ruling: in Headquarters Ruling Letter ("HQ") 965072, dated September 19, 2001, we considered and rejected classification under heading 7117, HTSUS, and classified a plastic sleeve suspended from a textile lanyard with a swivel hook (laminated to enclose the information to be displayed and designed for use at a specific, one-time event) under heading 6307, HTSUS.

HOLDING:

The plastic identification badges (style numbers 77711 74520, 77711 74536 and 77711 74540) are classified under subheading 3926.90.98, HTSUS, which provides for other articles of plastics, other, other.

EFFECT ON OTHER RULINGS:

NY F81413 is **REVOKED**. In accordance with 19 U.S.C. § 1625 (c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 04–35

P. L. THOMAS PAPER CO., INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 99–00671

[After trial, judgment entered for defendant.]

Dated: April 15, 2004

Law Offices of David C. Williams (*David C. Williams*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Graves Walser*), *Sheryl A. French*, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, for defendant.

OPINION

RESTANI, Chief Judge:

This matter is before the court following trial. At issue is the proper classification of certain entries of paper intended for conversion into reinforced gummed tape for sealing cartons. The classification of the United States Bureau of Customs and Border Protection ("Customs"), then known as the United States Customs Service, was properly protested and suit was timely filed after denial of the relevant protests. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000) (denial of protest).

The following facts are not in dispute:

1. Plaintiff, P. L. Thomas Paper Company, Inc., is the owner and importer of record of the merchandise at issue.

2. The entries at issue are:

No. 204–0648151–3, made on February 15, 1996;

No. 030–0132020–3, made on October 22, 1997;

No. 030–0132148–2, made on October 29, 1997;

No. 204–1756657–5, made on May 7, 1997; and

No. 204–1757045–2, made on May 22, 1997.[1]

3. The importer described the paper imported under cover of these entries as follows:

> [T]he paper [is] MG pure Swedish natural brown unbleached plain sulphate kraft paper. The paper is made from 100% virgin unbleached Swedish kraft pulp and is uncoated. . . . The paper is supplied on rolls maximum of 40″ in diameter with varying widths from 49 to 97″, each roll weights about 1,000 kilos. The paper has a minimum basis weight of 38 grs/ms (23#-24x36/500); a caliper reading of .002″ +/−; and a high porosity measurement of 40/50 seconds 10cc gurley.

Pretrial Order Sch. C ¶8.

4. The paper is imported in bulk and is intended for use and actually used in conversion to reinforced carton sealing tape.

5. At all times relevant to this action, the Harmonized Tariff Schedule of the United States ("HTSUS") provided the following statutory provisions:

Chapter 48 Note 5	In this chapter "*kraft paper and paperboard*" means paper and paperboard of which not less than 80 percent by weight of the total fiber content consists of fibers obtained by the chemical sulfate or soda processes.	
Heading 4804	Uncoated kraft paper and paperboard, in rolls or sheets, other than that of heading 4802 or 4803:	
	* * * *	
	Other kraft paper and paperboard weighing 150 g/m2 or less:	
Subheading 4804.31	Unbleached:	
	* * * *	
Subheading 4804.31.40	Wrapping paper.....	Free
Subheading 4804.31.60	Other.....	2.8% *ad valorem*

[1] This is a test case which may affect 157 other entries covered in other actions before the court.

Subheading 4804.39	Other:	
	* * * *	
	Other:	
Subheading 4803.39.60	Other	2.8% *ad valorem*

6. The paper at issue is "kraft paper" and is classifiable under Heading 4804, HTSUS.

7. Customs liquidated the imported kraft paper under subheading 4804.39.60, HTSUS, pursuant to Customs Headquarters Ruling Letter 961068 (dated June 3, 1999), as "Uncoated kraft paper and paperboard, in rolls or sheets, other than that of heading 4802 or 4803: Other kraft paper and paperboard weighing 150 g/m2 or less: Other: Other" at a duty rate of 2.8% *ad valorem*.

8. Plaintiff, P. L. Thomas, claims that the imported merchandise is properly classified under subheading 4804.31.40, as "Other kraft paper and paperboard weighing 150 g/m2 or less: Unbleached: Wrapping paper," a duty-free provision.

9. The tariff term "wrapping paper" is not statutorily defined. It is also not defined in the *Explanatory Notes* to the HTSUS.

10. "Wrapping paper" is a class or kind of kraft paper which is manufactured, sold, and principally used for wrapping purposes.

At trial, plaintiff's witness, its president Richard Greene, testified. He has more than three decades of experience in the paper business. It was Mr. Greene's testimony that wrapping paper is a broad category of unbleached kraft paper falling within an 18–70 pound range, which is known for its strength, and that is principally used in the United States to make paper bags. Tr. at 18–19, 21. He testified further that, as imported, the paper at issue fits within this definition of wrapping paper. Tr. at 41. Mr. Greene's testimony also revealed: The imported paper is made with a shiny, smooth machine glaze finish on one side and an unsmooth machine finish on the other side. Tr. at 12. It has a porosity measurement of 40 to 60 seconds, 100 cc. gurley, which indicates that it is a tight sheet suitable for coating with another substance. Tr. at 14–15. The imported paper has a minimum weight of 38 g/m^2, which is 23 pounds. Tr. at 13. The imported merchandise is a specialty paper known commercially as "gumming paper." Tr. at 46, 48. Subsequent to importation, the imported paper was laminated and coated with glue stain to make gummed sealing tape. Tr. at 17, 24, 59–60.

The government's witness, Robert Sexton, has an equally long acquaintance with the paper industry, as well as formal academic training in the pulp and paper industry. He testified as follows: The imported paper does not move in the same channels of trade as "wrapping paper." Tr. at 91–92. Typically, wrapping paper was sold

to manufacturers of counter rolls.[2] Tr. at 91; *see also* Tr. at 25 (Greene). Presently, the primary paper industry is one of the largest users of wrapping papers for protecting large paper rolls and cut-sized sheets of photocopy paper. Tr. at 105; *see also* Tr. at 25 (Greene). Gumming paper, on the other hand, "would go to a gummer." Tr. at 91–92. The imported paper is not used in the same manner as "wrapping paper." Tr. at 107. Wrapping paper is coarse, unfinished paper used to wrap products. Tr. at 84, 93. Gumming paper is the raw material used to manufacture reinforced gummed tape and is not economically practical for wrapping purposes. Tr. at 92, 114.

The witnesses agreed that gumming papers and wrapping papers are both unbleached kraft paper with a base weight between 18.5 and 79 pounds, but that the other specifications for each type of paper differ. Tr. at 16, 18 (Greene), 100–01 (Sexton). Bulk paper destined to be gummed for use as reinforced tape is made to tight specifications that make it suitable for its intended end use. Tr. at 12–14, 17, 42 (Greene), 85–86, 116–17 (Sexton); *see supra* Uncontested Facts ¶3 (describing specifications of imported paper). Strength, porosity, and surface smoothness are important physical characteristics of gumming paper. Tr. at 17 (Greene), 90 (Sexton). Gumming paper also requires specifications for base weight, thickness, moisture content and wet strength, among other things. Tr. at 13–17 (Greene), 90 (Sexton). Wrapping paper, by contrast, has few required specifications beyond weight and strength, but the specifications can be customized for particular end uses. Tr. at 18, 27–28, 38 (Greene), 90, 108–11, 117 (Sexton). Counter roll paper does not require specifications other than weight. Tr. at 16, 42 (Greene), 108–09, 117 (Sexton).

The finished product, a roll of reinforced gummed tape (72mm x 114.3M) was admitted as Plaintiff's Exhibit 8. A sample of the paper as imported was admitted as Plaintiff's Exhibit 1.

DISCUSSION

The tariff interpretation issue, as framed by the parties at trial, is whether "wrapping paper" is a broad term covering all bulk kraft paper of an appropriate weight or whether the term is a more narrow one limited to paper intended for a wrapping or enclosing function. Defendant argues for a very narrow definition limited to paper intended for making counter rolls. It is not necessary, however, to reach such a narrow definition to resolve this case, as even a broader definition does not encompass the product at issue.

Although the parties presented evidence at trial, it was largely to help the court understand the meaning of a tariff term, an issue of

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[2] Counter rolls are not as widely used as they once were, but they are the familiar rolls of usually brown paper sometimes used in retail stores to wrap packages for customers. Counter rolls largely have been supplanted by bags or sacks. Tr. at 31.

law.[3] The court is guided as to tariff interpretation principally by the one case on point, *D. C. Andrews & Co. of Mass. v. United States*, 55 Cust. Ct. 354 (1965). The merchandise at issue there was paper board, which plaintiff claimed was classifiable as "wrapping paper." The court held that the determination of whether a class of paper is "wrapping paper" under the tariff schedules is governed by the paper's "chief use."[4] *Id.* at 357. In ruling against the plaintiff, the court stated:

> [A]ll of the witnesses who were asked to comment upon the matter distinguished paper such as is here involved from the kind of coarse paper which the trade might consider to be wrapping paper and agreed that the subject paper was of a class or kind used for the making of tags, labels, and file folders. These are uses which we do not find synonymous with, nor so related to, the process of enclosing and covering a package, as to respond to characterization as wrapping paper uses.

Id. at 361. The court also noted plaintiff's attempt, similar to that of plaintiff here, to include a large variety of papers within the term "wrapping paper." It also relied on various dictionary definitions to ascertain the common meaning of that term. *Id.*; *see Myers*, 21 CIT at 662, 969 F. Supp. at 73 ("In ascertaining common meaning, the court may rely on its own understanding of the term used, and may consult dictionaries, scientific authorities, and other reliable sources of information.").

Here, several dictionary definitions were agreed on by the parties. They are similar to those relied on in *D. C. Andrews* and are as follows:

1. *The Oxford English Dictionary* (2d ed. CD-ROM 1999), defines the term "wrapping paper" as a "special make of strong paper for packing and wrapping up parcels."

2. The term "wrapping paper" is defined in John R. Lavigne's *Pulp & Paper Dictionary* 477 (1986) as "[p]aper with high strength and of different weights made especially to be used for wrapping purposes."

3. The American Paper Institute, Inc.'s *The Dictionary of Paper* 456 (4th ed. 1980) provides that "wrapping paper" is "[a] general term applied to a class of papers made of a large variety of furnishes

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[3] "It is well-settled that the meaning of tariff terms is a question of law, while the determination whether a particular item fits within that meaning is a question of fact." *E.M. Chemicals v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990). Thus, as a matter of law, Customs's construction of a tariff term will be reviewed by the court *de novo*. *Myers v. United States*, 21 CIT 654, 662, 969 F. Supp. 66, 73 (1997).

[4] If the tariff classification had aspects of an *eo nomine* provision, this would not change the outcome as common meaning would still control. *Becker Glove Int'l, Inc. v. United States*, No. 02–00278, Slip Op. 02–55 at 2 (Ct. Int'l Trade June 18, 2002) (construing *eo nomine* designation that was not defined in the HTSUS "according to its common and popular meaning"); *see infra* n.5.

on any type of paper machine and used for wrapping purposes. Strength and toughness are predominant qualities." *See also The Dictionary of Paper* 482 (3d ed. 1965).

4. *The Dictionary of Paper* 389 (2d ed. 1951) defines "wrapping paper" as being: "[a] general term applied to a class of papers made of a large variety of furnishes on a Fourdrinier, cylinder, or Yankee machine and used for wrapping purposes. Strength and toughness are predominant qualities."

The one dictionary which assists plaintiff is E. J. Labarre's *Dictionary and Encyclopedia of Paper and Paper-Making* 373 (2d ed. 1952), published in Amsterdam, Netherlands, which lists over thirty uses for "wrapping paper" including "sealings." This lone and somewhat old source does not convince the court that the *D. C. Andrews* common meaning definition is wrong.[5] First, this foreign source may not reflect current HTSUS meaning of the term "wrapping paper." Second, as recognized by *D. C. Andrews*, the common understanding of the term "wrapping paper" is paper chiefly used to wrap or envelop an object. There is no dispute that the "particular class or type" of gumming paper imported here is specifically engineered for conversion to reinforced gummed tape. In examining the product as imported, Plaintiff's Exhibit 1, it is readily apparent that one side has been made very smooth in preparation for glue coating and conversion to gummed tape. Moreover, as the uncontradicted testimony of Mr. Sexton revealed, it is not commercially practical to use this type of paper as wrapping paper. Accordingly, the court holds that the imported gumming paper does not fall within the common understanding of "wrapping paper."[6] *See D. C. Andrews*, 55 Cust. Ct. at 357, 361. Plaintiff has not met its burden of proving that "there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade." *Rohm & Hass Co.*, 727 F.2d at 1097 (internal quotation marks and citation omitted).

The court does not decide whether papers made to bag or sack specifications are or are not "wrapping papers." Bags and sacks envelop items in a way that sealing tape does not, and their classification is not at issue here.

Accordingly, judgment shall enter for the defendant.

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[5] "When a tariff term is not clearly defined by either the HTSUS or its legislative history, the meaning of the term is generally resolved by ascertaining its common and commercial meaning." *Myers*, 21 CIT at 662, 969 F. Supp. at 73 (citing *W.Y. Moberly, Inc. v. United States*, 924 F.2d 232, 235 (Fed. Cir. 1991)); *see also Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984) ("The meaning of a tariff term is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary.").

[6] Plaintiff did not argue that the tape end product is used to envelop anything, and in fact it does not. The tape is only 2.8" wide and is used only to seal packages.

Slip Op. 04–36

ELKEM METALS COMPANY and GLOBE METALLURGICAL INC., PLAINTIFFS, v. UNITED STATES, DEFENDANT, -and- COMPANHIA BRASILEIRA CARBURETO DE CÁLCIO, INTERVENOR-DEFENDANT.

Consolidated Court No. 01–00098

Memorandum & Order

[Upon motion for relief from results of antidumping-duty administrative review, remand to International Trade Administration.]

Decided: April 15, 2004

Verner, Liipfert, Bernhard, McPherson and Hand, Chartered (*William D. Kramer*, *Jessie Marie Brooks* and *Virginia C. Dailey*) for the plaintiffs.[1]

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Reginald T. Blades, Jr.*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*John F. Koeppen*), of counsel, for the defendant.

Dorsey & Whitney LLP (*Philippe M. Bruno* and *Rosa S. Jeong*) for the intervenor-defendant[2] and Eletrosilex S/A.

AQUILINO, Judge: This case commenced pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii) and 28 U.S.C. §§ 1581(c) and 2631(c) consolidates complaints filed by Companhia Brasileira Carbureto de Cálcio ("CBCC") and Eletrosilex S/A, CIT No. 01–00082, and by Elkem Metals Company and Globe Metallurgical Inc., CIT No. 01–00098, each praying for relief from *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 66 Fed.Reg. 11,256 (Feb. 23, 2001), promulgated by the International Trade Administration, U.S. Department of Commerce ("ITA").[3] In pertinent part, those *Final Results* were weighted average antidumping-duty margins of 0.63 percent for CBCC and 93.20 percent for Eletrosilex. *See* 66 Fed.Reg. at 11,257. The former led to the following reported rationale:

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[1] Samuel J. Waldon and Matthew T. West of Baker Botts LLP, counsel for Elkem Metals Company and Globe Metallurgical Inc. in CIT No. 01–00082, which has been consolidated herein, have filed papers in opposition to the motion of Eletrosilex S/A for judgment on the agency record.

[2] Subsequent to the service of his motion papers herein, Philippe M. Bruno filed a notice of substitution of attorneys for this party by Greenberg Traurig, LLP.

[3] The above-encaptioned plaintiffs ("Elkem & Globe") were granted leave to intervene as parties defendant in the first matter, from which resultant adverse posture they interposed a motion to dismiss Eletrosilex as a party with any actionable claim, alleging lack of standing. That motion has been denied per the court's slip opinion 02–34, 26 CIT ____, 196 F.Supp.2d 1367 (2002), familiarity with which is presumed.

> After review of the record, the Department determines that although CBCC has had zero or *de minimis* dumping margins for the previous two review periods, during the current review CBCC's weight-averaged dumping margin is determined to be 0.63 percent, above the *de minimis* rate . . . 0.50 percent . . . . Consequently, CBCC has not made sales of subject merchandise "at not less than NV for a period of at least three consecutive years" as required by the Department's regulations. Because one of the requirements to qualify for revocation has not been met, . . . we determine not to revoke this order with respect to CBCC.

Id. at 11,256–57. The notice of the *Final Results* adopts the ITA's Issues and Decision Memorandum for discussion of the points pressed by the parties, including Eletrosilex. *See id.* at 11,256. That memorandum explains the margin for this exporter, in part, as follows:

> Eletrosilex, an experienced participant in the antidumping proceedings since the 1991–1992 POR[ ] was on notice as provided by the Department's past practice that if it failed to act to the best of its ability, and the Department applied adverse FA, the rate selected could very well be the highest calculated rate in the proceediing, *i.e.*, the 93.20 percent rate obtained in the LTFV investigation. In determining the FA rate here, the Department considered the fact that, in the 1993–1994 and 1994–1995 PORs, [it] calculated dumping margins of 61.58 percent for CBCC and 81.61 percent for RIMA, respectively, while at the same time, calculating zero or single digit rates for other respondents, demonstrating that in this particular market, some companies may continue to dump at substantial margins while others have eliminated or substantially lowered their margins. The fact that these disparate rates have continued throughout the reviews since the original LTFV investigation, combined with [ ] Eletrosilex's failure to respond to the request for information, supports our conclusion that the 93.20 percent rate from the investigation remains reasonable and relevant. The Department's determination here is in accordance with [it]s policy of selecting the highest calculated rate in the entire proceeding in order to induce future cooperation of a respondent.[4]

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[4] Appendix 8 to Brief in Opposition to Plaintiff Eletrosilex's Motion for Judgment Upon the Agency Record, p. 15. The references "POR", "FA", "LTFV", and "RIMA" are abbreviations for "period of review", "facts available", "less than fair value", and for the respondent "Rima Industrial S.A.", respectively.

I

The plaintiffs Elkem & Globe have interposed a motion for judgment upon the ITA record pursuant to USCIT Rule 56.2. The sole thrust of the motion is that the agency failed to fulfill its statutory obligation of calculating the cost of production ("COP") and constructed value ("CV") based on the actual costs incurred by the producer or exporter under investigation, which failure, according to them, has given rise to the issue of

> whether the Department erred in calculating the financial expenses included in COP and CV for CBCC, the producer and exporter of the subject merchandise, based on the financial statements of its indirect Belgian parent, Solvay & Cie, when the actual financial costs incurred by CBCC greatly exceeded the financial costs calculated by the Department.

Plaintiffs' Brief, p. 2.

The defendant and CBCC each accept this as the issue between them and the plaintiffs for resolution. *See* Defendant's Memorandum, p. 2; Defendant-Intervenor's Brief in Opposition, p. 1. And each defends the ITA's approach on the basis of existing agency practice and case law. Their papers, understandably, cite and discuss the litigation *sub nom. American Silicon Technologies v. United States*, CIT No. 97–02–00267, one of a series of suits contesting the final results of ITA administrative reviews of the same antidumping-duty order. The action bearing that CIT docket number entails judicial review of the ITA's reliance, in re CBCC, on the consolidated financial statements of Solvay & Cie of Belgium, not Brazil. *See, e.g., American Silicon Technologies v. United States*, 23 CIT 237, 244–45 (1999). That opinion rejected as without merit the agency's claimed established practice of using such consolidated statements of a respondent's parent corporation, rather than those of the respondent itself, whenever the record establishes, *prima facie*, parental corporate control. The court also was unable to find the requisite substantial evidence on the record in support of that approach, whereupon it remanded

> the calculation of CBCC's financial expenses with the instruction that Commerce base those expenses upon the consolidated financial statements of CBCC and its immediate parent Solvay do Brasil.

Id. at 245. The ITA complied with the court's order, and the results of the remand on that issue were affirmed. *See American Silicon Technologies v. United States*, 25 CIT ___ , ___ , Slip Op. 01–109, pp. 3–6 (Aug. 27, 2001).

By the time of that affirmance, the actions comprising this consolidated case had commenced, and, a few months later, CBCC, a party

to those prior proceedings, noticed a timely appeal from that affirmance that has resulted in the following decision, to quote from it in part:

> . . . [T]he trial court . . . remand . . . limited Commerce's examination to CBCC's transactions with Brasil. This order prevented Commerce from further assessing the relationship between Brasil and Solvay or CBCC and Solvay. This limit on the remand methodology further inhibited Commerce's ability to ensure an accurate assessment of CBCC's financial costs. As Commerce notes on appeal, during the remand proceedings, Commerce gathered more information about the relationship between CBCC and Brasil, but not with regard to the relationship between CBCC or Brasil and Solvay. Thus, the record in the remand is deficient because Commerce could not compare the consolidated statements of Solvay with the consolidated statements of Brasil. By sharply limiting Commerce's inquiry, the trial court's remand actually prevented Commerce from undertaking a fully balanced examination that might have produced more accurate results.
>
> Therefore, this court reverses and remands with instructions to require Commerce to carry out its statutory duty of accurately assessing "general costs" . . . .

American Silicon Technologies v. United States, 334 F.3d 1033, 1038–39 (Fed.Cir. 2003).

While the facts underlying that contested ITA administrative review are still *sub judice*[5], the issue posited above by the plaintiffs Elkem & Globe in this case has been resolved as a matter of law by the court of appeals adversely to their position, *viz.*:

> As a legal matter, the Court of International Trade had an obligation to defer to Commerce's reasonable methodology in the first place, but no such deference was afforded. Thus, according proper deference, *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570, 1575 (Fed.Cir. 1994), this court sustains as reasonable Commerce's well established practice of basing interest expenses and income on fully consolidated financial statements.

Id. at 1038. Hence, plaintiffs' motion for judgment upon the agency record must be, and it hereby is, denied.

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[5] This court notes in passing that, pursuant to the order of remand, *American Silicon Technologies v. United States*, 27 CIT ____, Slip Op. 03–109 (Aug. 25, 2003), the ITA has filed its determination of 0.37 percent as the weighted-average margin for CBCC for the particular period of review at issue. *See Silicon Metal from Brazil: Final Results of Redetermination Pursuant to Court Remand*, p. 6 (Dec. 15, 2003).

II

The motion of CBCC and Eletrosilex for such a judgment on their behalf propounds the following issues for the court's adjudication:

> 1. Whether . . . Commerce's selection of the surrogate interest rate to calculate CBCC's imputed credit expense was supported by substantial evidence on the record and otherwise in accordance with law.
>
> 2. Whether . . . Commerce's rejection of the interest rate based on CBCC's borrowing experience was supported by substantial evidence on the record and otherwise in accordance with law.
>
> 3. Whether the Department's use of adverse inference in applying total fact[s] available to Eletrosilex was supported by substantial evidence on the record and otherwise in accordance with law.
>
> 4. Whether the Department properly corroborated thetotal facts available applied to Eletrosilex as total facts available, in accordance with law.

A

On its part, the defendant would compress the first two of these enumerated issues into one, namely, whether the ITA properly calculated CBCC's home-market imputed credit expense based upon an established Brazilian commercial reference rate rather than a higher rate based upon a CBCC loan that was due after only several days. Defendant's Memorandum, p. 3. This formulation apparently has been derived from that part of the controlling Decision Memorandum that sets forth the ITA's determination to use Brazil's *Taxa Referencial ("TR")* rate to calculate CBCC's imputed home-market credit costs.[6] Be that as it may, defendant's counsel eschew any defense now on this issue, requesting instead a remand to the ITA for reconsideration and to give this determination "full and fair consideration under the applicable law." *Id.* at 2.

CBCC welcomes this request, while the plaintiffs take the position that the *TR* is an appropriate surrogate rate for calculating Brazilian home-market credit expenses when a respondent does not have short-term borrowings during the period under review. *See* Plaintiffs' Brief in Opposition to Defendant-Intervenor's Motion for Judgment *passim*.

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[6] *See* Appendix 8 to Brief in Opposition to Plaintiff Eletrosilex's Motion for Judgment Upon the Agency Record, p. 19.

Having perused and carefully considered that entire brief, the court nonetheless concludes that defendant's remand request should be granted, in part in the light of the ITA's *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 67 Fed.Reg. 6,488 (Feb. 12, 2002), which was published just prior to that and the other briefs at bar and in which the accompanying Issues and Decision Memorandum found that the *TR* is "the index for savings accounts" and therefore concluded that it was "not reasonable to use the TR rate as a surrogate interest rate for short-term commercial borrowings". A–351–806, ARP 7/1/99–6/30/00 (Feb. 12, 2002) (Comment 1), available at *http://ia.ita.-doc.gov/frn/summary/2002feb.htm*.

B

Given the protracted and continuing administrative and judicial proceedings centered on the ITA's antidumping-duty order governing imports into the United States of silicon metal from Brazil and its administrative reviews thereof, the adverse inferences spelled out by Congress in 19 U.S.C. § 1677e(b) and drawn by the agency and the courts upon failure to provide information within the meaning of section 1677e(a) surely have been, and continue to be, well-understood by all the parties there- and hereto. Indeed, experienced counsel do not claim otherwise.

All that is claimed by the government herein is that "Eletrosilex chose not to respond to the Department's . . . *supplemental* questionnaire".[7] However, as discussed in *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 842, 77 F.Supp.2d 1302, 1316 (1999), for example,

> failing to respond does not have to be read negatively. A respondent can fail to respond because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request. Thus, without further explanation by Commerce, the Court will not infer that a respondent's failure to respond constitutes substantial evidence that it failed to cooperate to the best of its ability.

That is, the agency must "articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of th[at] information is of significance to the progress of its investigation". 23 CIT at 839, 77 F.Supp.2d at 1313–14. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003).

Upon reading the ITA's reported reasoning[8] and reviewing the record filed herein, such as it is, the court cannot concur that the

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[7] *Id.* at 12 (emphasis added). *See* Defendant's Memorandum, p. 36.

[8] *See supra*, note 6, pp. 11–15.

supplemental information requested was "critical"[9] . To be sure, the agency's responsibility of prescribing mathematical margins of dumping is always a most daunting task. But, as indicated, this consolidated case is not proceeding on an empty slate. For example, in *American Silicon Technologies v. United States*, 24 CIT 612, 624, 110 F.Supp.2d 992, 1002 (2000), both the ITA and the court seemingly recognized "Eletrosilex's history of compliance". *See, e.g., Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review*, 63 Fed.Reg. 42,001, 42,007 (Aug. 6, 1998):

> . . . In the past, Eletrosilex has demonstrated an understanding for requests of additional information by the Department.

In fact, that history led the court to opine that it actually supports the claim that Eletrosilex was unable to respond to the no-less-than-three supplemental agency requests for information at issue. *See* 24 CIT at 624, 110 F.Supp.2d at 1002. That is,

> it does not follow that simply because Eletrosilex was able to respond to prior questionnaires it was able to respond to the . . . questionnaires at issue here . . . when viewed in light of Eletrosilex's notification to Commerce that "it is undergoing top to bottom management reviews, and because of changes in staffing, it is *not able* to respond in a timely manner".[10]

In sum, the court concluded:

> Commerce has not made the necessary finding that Eletrosilex failed to respond to *the best of its ability*. After reviewing Commerce's reasoning, the Court concludes that the primary basis for its determination was the mere fact that Eletrosilex failed to respond to the two supplemental questionnaires. As previously noted in *Borden*[, Inc. v. United States, 22 CIT 233, 4 F.Supp.2d 1221 (1998),] and *Mannesmannrohren-Werke, supra*, this is only a recitation of the standard for the application of facts available under 19 U.S.C. § 1677e(a)(2)(B) and is inadequate justification for making an adverse inference pursuant to 19 U.S.C. § 1677e(b). Accordingly, the Court remands this issue for reconsideration and instructs Commerce to reopen the administrative record and collect additional evi-

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[9] *Id.* at 13.

[10] 24 CIT at 624, 110 F.Supp.2d at 1002 (emphasis in original). The excuses proffered by Eletrosilex herein are not dissimilar. *See, e.g.*, Brief in Support of [CBCC & Eletrosilex] Plaintiffs' Rule 56.2 Motion, p. 31.

On their part, the gist of Elkem & Globe's motion to dismiss Eletrosilex from this consolidated case for lack of standing was that it

> no longer manufactures, produces or exports silicon metal. Thus, pursuant to the plain language of . . . 19 U.S.C. § 1516a . . . , Eletrosilex is not an interested party and cannot participate in this appeal, as a matter of law.

> dence concerning Eletrosilex's claimed inability to respond to the supplemental questionnaires.

24 CIT at 625, 110 F.Supp.2d at 1003 (emphasis in original).

After this remand (and commencement of this consolidated case), the court was able to find substantial evidence developed on the record in support of the ITA's approach:

> . . . [T]he reason Eletrosilex could not answer Commerce's supplemental questionnaires was because it dedicated the personnel capable of answering those questions to preparing information requested by Eletrosilex's potential purchaser. . . . . The record shows that Eletrosilex decided to suspend certain operations, including participation in antidumping proceedings, during the period in question in order to curtail costs in anticipation of the sale of the company. . . . . While Eletrosilex was facing bankruptcy during the period in question, the fact remains that it allocated its resources toward satisfying the requests of the prospective purchaser rather than Commerce.

American Silicon Technologies v. United States, 26 CIT ___ , ___ , 240 F.Supp.2d 1306, 1311 (2002).

C

Given this overlap of cases and related claims, the question arises as to whether or not this court can assume similar results of any remand on the issue of Eletrosilex's ability to have provided the requested supplemental information to the ITA. Presuming it can, the related question remains whether the 93.20 percent margin sought to be imposed is "relevant, and not outdated, or lacking a rational relationship". *Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F.Supp.2d 1310, 1335 (1999). Stated another way, an adverse-facts-available rate should be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir. 2000). *Accord*: *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed.Cir. 2002).

The court's slip opinion 02–123 in *American Silicon Technologies* points out that the actual margins calculated for Eletrosilex in other ITA administrative reviews fluctuated between 18.87 and 51.84 percent. Also, the

> highest calculated rates for the first through fifth administrative reviews were 53.63 percent, 51.84 percent, 61.58 percent, 67.93 percent, and 39.00 percent respectively. . . . The Court also finds it significant that the period of review in question began six years after the Less Than Fair Value Investigation in which the 93.20 percent margin was calculated. This fact along

> with the fact that this margin is 25.27 percent higher than the highest margin calculated based on actual information in the intervening administrative reviews (*i.e.* the 67.93 percent margin calculated in the fourth administrative review) leads the Court to conclude that the 93.20 percent margin is inconsistent with actual commercial practices at and around the time in question . . . [and] is so far removed from being "a reasonably accurate estimate of the respondent's actual rate" that it is disproportionately punitive in nature.[11]

Whereupon that matter was remanded a second time to the ITA, which thereafter duly reported a revised rate of 67.93 percent that has been affirmed by the court, *American Silicon Technologies v. United States*, 27 CIT ___ , 273 F.Supp.2d 1342 (2003).

III

While the court in that case has since stayed the judgment of affirmance therein

> pending the final determination of the dumping margins in the fourth administrative review of the antidumping duty order on silicon metal from Brazil, *sub nom. American Silicon Technologies v. United States*, Consolidated Court No. 97–02–00267[,[12]]

this court hereby grants the USCIT Rule 56.2 motion of CBCC and Eletrosilex[13] to the extent of remand now to the defendant of this consolidated case to impute anew (1) CBCC's home-market credit costs and (2) Eletrosilex's margin of dumping for the period of review implicated that is in accordance with law and supported by substantial evidence on the record.

Should this remand at this time not be in the interests of advancement of all of the existing, related Brazilian silicon metal matters to final resolution, the parties to this particular consolidated case may confer and propose to this court a mutually-more-desirable schedule. Otherwise, the defendant may have 45 days herefrom within which to carry out this remand and to report the results thereof to the court and the other parties, which may then comment thereon within 30 days of receipt thereof.

So ordered.

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[11] 26 CIT at ____ , 240 F.Supp.2d at 1213–14. *Cf.* Reply of Plaintiffs [CBCC & Eletrosilex] in Support of Their Motion for Judgment Upon the Agency Record, pp. 6–8.

[12] *American Silicon Technologies v. United States*, 27 CIT ____ , ____ , Slip Op. 03–144, p. 2 (Oct. 30, 2003).

[13] The quality of the papers filed in support of and opposition to this motion and the motion of the plaintiffs obviated any need to grant their joint motion for oral argument.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/22 4/13/04 Pogue, J.	Buxton Co.	00–04–00186	4202.21.60 10% 4202.22.15 19.2%, 18.8% or 18.4%	4202.31.60 8% 4202.32.10 12.1¢kg + 4.6%	Agreed statement of facts	Boston Wallets

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